BEAU HICKORY & PATRICIA L. TINNELL

IBLA 99-312 Decided October 23, 2003

Appeal from a decision of the Supervisor, Lands and Minerals Operations, Arizona State Office, Bureau of Land Management, rejecting application to correct Patent No. 12351.

Affirmed; hearing denied.

1. Patents of Public Lands: Generally–Words and Phrases

A patent is the means by which legal title to public land passes out of Federal ownership. The patent is both evidence of the lands identified to be conveyed and declaratory of the title conveyed.

2. Federal Land Policy and Management Act of 1976: Correction of Conveyance Documents–Patents of Public Land: Correction

Under section 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (2000), the Secretary has authority to correct errors in patents and conveyance documents where an error in fact requires correction and considerations of equity and justice favor such correction. Where an 1887 patent issued for a lode mining claim on its face did not make reference to a millsite by name, lot, survey number or description; the millsite survey number or description was not incorporated into the land description in the patent; and where Departmental records confirm that the separate mineral entry for the millsite was canceled by a final Departmental decision in 1894, BLM properly denies relief under section 316 of FLPMA. Absent proof of

error in the patent or conveyancing document, this Board will affirm the decision denying relief.

3. Estoppel–Patents of Public Lands: Generally

Title to public lands is granted by patent, not by the status reflected in land records. The grantee of a patent and the successors thereof are on constructive notice of the contents of the patent. Local tax assessment records neither purport to be title nor convey it. Appellants' reliance on local tax records to establish their claim of ownership therefore is misplaced.

APPEARANCES: Beau Hickory and Patricia L. Tinnell, Chino Valley, Arizona, pro sese; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Beau Hickory and Patricia L. Tinnell have appealed an April 14, 1999, decision of the Supervisor, Lands and Minerals Operations, Arizona State Office, Bureau of Land Management (BLM), rejecting their application to correct Patent No. 12351, which was issued to the Gosper Horse and Cattle Co. (Gosper) on July 22, 1887, for the Golden Eagle lode mining claim, located in secs. 15 and 16, T. 15 N., R. 1 E., Salt River and Gila Meridian (SR&GM), Yavapai County, Arizona. [1/]

This appeal concerns an application to correct Patent No. 12351 pursuant to section 316 of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. § 1746 (2000), and implementing regulations at 43 CFR Subpart

[1/] Patent No. 12351 was issued before the area was officially surveyed. Accordingly, the historical index does not identify the location of the patent by township and range. The Master Title Plat (MTP) describes the patented lands by township and range, but does not record any other identifying information. However, the Mining District Sheet for the Verde and Mineral Point Mining Districts clearly place the Golden Eagle mining claim as described in the patent. (Answer, Ex. L to the Affidavit of Kenny Ravnikar, Chief Cadastral Surveyor, Arizona State Office, BLM (Ex. HH).

1865, [2/] and raises the question of whether, by virtue of a quitclaim deed from Jean B. James dated September 5, 1997, appellants acquired title to approximately 5 acres of land located mostly in sec. 6, T. 15 N., R. 2 E., SR&GM, Yavapai County, Arizona, known as the Golden Eagle millsite. [3/] (SOR at 1; SOR App., Tab C.)

By its terms, Patent No. 12351 conveyed to Gosper the "Golden Eagle lode mining claim, designated by the Surveyor General as Lot 37A, embracing a portion of the unsurveyed public domain in the Mineral Point Mining District, in the County of Yavapai." (Appendix (App.) to appellants' Statement of Reasons (SOR), Tab E at 48; Answer, Ex. AA.) [4/] Appellants nevertheless assert that, in addition to the Golden Eagle mining claim, Patent No. 12351 includes or should have included the Golden Eagle millsite, designated by the Surveyor General as Lot No. 37B (millsite) and, consequently, that they now own fee title to both claims. [5/] BLM maintains that the

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[2/] Appellants have consistently maintained that there is no need for a patent correction because Patent No. 12351 necessarily includes the millsite. (E.g., SOR at 3, Response to Answer at 22.) BLM likewise has consistently denied that the millsite was patented with the mining claim, but recommended that appellants file an application pursuant to section 316 to ensure an opportunity to adjudicate the merits of their contentions. This is because appellants obviously do not qualify to proceed pursuant to the Color of Title Act, as amended, 43 U.S.C. § 1068 (2000): they have neither been in possession of the land for more than 20 years, nor placed valuable improvements on it. Moreover, because they had inquired of the U.S. Forest Service and knew that the land was Federally owned before they purported to acquire it by quitclaim deed, they cannot show the requisite good faith or adverse possession. See, e.g., Archie Ledon Cole, 155 IBLA 202 (2001); Joe T. Maestas, 149 IBLA 330 (1999); James G. Stockton, 139 IBLA 138 (1997).

[3/] The quitclaim deed was recorded in Book 3491, page 918 of the "Official Records of Yavapai County" and conveys to appellants "all right, title and interest" in 5 acres of property in the "Mineral Point District," described as the "GOLDEN EAGLE Millsite Claim, designated by the Surveyor General as Lot Numbered 37B," in sec. 6, T. 15 N., R. 2 E. (SOR App., Tab C.)

[4/] Copies of historical documents of record relevant to this appeal were obtained by appellants from the County Recorder of Yavapai County, Arizona, and the National Archives. (Answer, 22 n. 16; SOR at 8.) BLM constructed its official record from the documents submitted by appellants. (Answer at 22 n. 16.) BLM also submitted copies of many of these documents as exhibits to its Answer. We will refer to these documents either by citing the specific tabs in appellants' Appendix or by BLM's exhibit designations, or both.

[5/] The MTP (Answer, Ex. K to Ravnikar Affidavit (Ex. HH)) shows the millsite to be

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Golden Eagle millsite is public land, and notes that approximately 3 of the 4.99 acres lie within the Prescott National Forest. (Decision at 1; Answer, Ex.R; BLM April 14, 2000, Response at 12-13.)

BLM's April 1999 decision rejected appellants' assertion, holding that the historical record submitted by appellants does not support their argument that the General Land Office (GLO) conveyed the Golden Eagle millsite to Gosper by Patent No. 12351. BLM further determined that Gosper lost all opportunity to perfect a patent for the millsite when it failed to appeal a notice holding its millsite entry for cancellation for failure to establish use and occupancy and the non-mineral character of the land. BLM therefore concluded that Lot 37B has never been privately owned.

Applicable Law and Principles

As amended, [6/] section 316 of FLPMA now provides:

> The Secretary may correct patents or documents of conveyance issued pursuant to section 1718 [section 208] of this title or to other Acts relating to the disposal of public lands where necessary in order to eliminate errors. In addition, the Secretary may make corrections of errors in any documents of conveyance which have heretofore been issued by the Federal Government to dispose of public lands. Any corrections authorized by this section which affect the boundaries of, or jurisdiction over, land administered by another Federal agency shall be made only after consultation with, and the approval of, the head of such other agency.

43 U.S.C. § 1746 (2000).

The statute is implemented by the provisions of 43 CFR Subpart 1865. An "error" in a patent is defined as:

> [t]he inclusion of erroneous descriptions, terms, conditions, covenants, reservations, provisions and names or the omission of requisite

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[5/] (...continued)
located mainly in sec. 6, T. 15 N., R. 2 E., SR&GM; however, the Mining District Sheet for the Verde, Black Hills, and Mineral Point mining districts (Answer, Ex. N to Ex. HH) place it straddling the boundary between sec. 1, T. 15 N., R. 1 E., and sec. 6, T. 15 N., R. 2 E, SR&GM.

[6/] Section 316 recently was amended to add the last sentence of the provision. 117 Stat. 291, Pub. L. No. 108-7, Div. F, Title IV, section 411(e) (Feb. 20, 2003).

> descriptions, terms, conditions, covenants, reservations, provisions and names either in their entirety or in part, in a patent or document of conveyance as a result of factual error. This term is limited to mistakes of fact and not of law.

43 CFR 1865.0-5(b).

According to Black's Law Dictionary (Revised 4th ed.), "[a] mistake exists when a person, under some erroneous conviction of law or fact, does, or omits to do, some act which, but for the erroneous conviction, he would have done or omitted." More particularly, a "mistake of fact" is "a mistake which takes place when some fact which really exists is unknown, or some fact which is supposed to exist which really does not exist; [footnote omitted] one not caused by the neglect of a legal duty on the part of the person making the mistake." 58 C.J.S. *Mistake* at 831-32. In contrast, a "mistake of law" is a "mistake which occurs when a person having full knowledge of facts comes to an erroneous conclusion as to their legal effect; [footnote omitted]." 58 C.J.S. *Mistake* at 832. Section 316 authorizes the correction of a patent only for mistakes of the former category, and accordingly, we now turn to the facts of this controversy. [7/]

Background

The Golden Eagle lode mining claim was located by Andrew E. Lynch on January 13, 1883. (SOR App., Tab E at 1-3.) On what appears to be the last page of the location notice, Lynch quitclaimed the mining claim to John J. Gosper on May 24, 1884. [8/] Id. at 3. On September 24, 1884, John J. Gosper, as agent for the Gosper

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[7/] The parties have vigorously argued their respective positions on appeal, and have provided numerous documents to support their arguments. Rather than delve into a line-by-line analysis of the parties' arguments and exhibits, we find it more useful to structure our analysis of the issues around the broader themes the parties have raised. In doing so, we emphasize that we have reviewed and considered the parties' evidence and arguments at length, including appellants' continuing allegation that BLM officials did not treat them or their pleadings with the proper respect (E.g., SOR at 3-7.)

[8/] Appellants have also submitted a copy of the handwritten "Indenture" dated June 8, 1885, between Lynch and John J. Gosper, which recites that the May 24, 1884, quitclaim deed was lost before it was recorded in Yavapai County. Acknowledging that Gosper had been in actual possession of the Golden Eagle mining claim since May 1884, the "Indenture" was executed for recordation and "to confirm the date and conveyance of the former deed." Id. at 4-5. This Indenture was

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Horse and Cattle Company, located "five acres of * * * non-mineral land as a millsite claim taken in connection with and for the benefit of the Golden Eagle Mining Claim in Mineral Point Mining District." Id. at 8, 9. According to its notice of location, the millsite claim was located "about four miles northeasterly from the Golden Eagle Mining claim." Id. at 8. This millsite became known as the Golden Eagle Millsite Claim.

On October 6, 1884, C. B. Foster, U.S. Deputy Mineral Surveyor, received instructions from the Surveyor General to survey the mining claim and the millsite. (SOR App., Tab E at 14.) The surveys were executed on October 14 and 15, 1884, id. at 15, 16, and resulted in metes and bounds descriptions of both claims based upon monument markers described in the location notices. Foster noted on both survey maps and in the survey description that the initial monument marker for the mining claim was located some 3 miles and 3296 feet distant from the initial marker for the millsite. Id. at 15-16, 18. Foster determined that the mining claim embraced 15.59 acres, whereas the millsite contained 4.99 acres. Id. at 15-16. The mining claim survey was assigned serial number 664; the millsite survey was assigned serial number 665. Id. Mineral Survey 664 designated the mining claim as Lot No. 37A; Mineral Survey 665 designated the millsite as Lot No. 37B. Id. Two survey plats were rendered. The millsite survey plat and notes stated that the land was non-mineral in character, and noted that improvements consisted of a stone cabin and frame house, and a shaft and "drift" at its bottom. Id. at 16, 25, 28. On October 15, 1884, apparently as part of the survey documentation, Foster also secured a "Non-Mineral Affidavit" from two witnesses who attested to the non-mineral character of the millsite land. (SOR App., Tab E at 28.) The two sets of field notes were approved by the Surveyor General on November 5, 1884. Id. at 31.

On November 19, 1884, Gosper published a notice in the *Arizona Weekly Journal-Miner* of its intention to apply for a patent for both the Golden Eagle mining claim and the millsite. (SOR App., Tab E at 32, 41.) That notice listed the metes and bounds descriptions of both mining claim and millsite; it noted that the mining claim was identified as Lot 37A and that the millsite was identified as Lot 37B; it indicated that the mining claim encompassed 15.59 acres, and that the millsite encompassed 4.99 acres; and it described the location of the millsite in relation to the mining claim as "bear[ing] S 55E40' W 3 miles and 3296 ft." Id. at 41. More specifically, after furnishing the legal description of the mining claim, the published notice stated:

[8/] (...ontinued)
received on June 10, 1885 and entered in "Book 20 of Deeds pages 398 - 401," in Yavapai County land records, as evidenced by the stamped recordation folio numbers. (SOR App., Tab G at 1-4.) The handwritten Indenture was transcribed to a printed form Indenture as well, for a purpose not disclosed by the documentation assembled by the parties. (SOR App., Tab E at 4-6.)

> Notice is likewise given that the above claimant, by its above-named attorney, has also this day filed its application for a patent for the Golden Eagle mill site, containing 4.99 acres of non-mineral land, taken in connection with the above-named Golden Eagle mining claim, situated in Mineral Point mining district, county of Yavapai and Territory of Arizona, and designated by the field notes and official plat on file in this office as Lot No. 37B. The exterior boundaries of said Lot No. 37 B being as follows, to wit * * *.

Id.

Also on November 19, 1884, Gosper filed its application for patent for the Golden Eagle mining claim, described as a vein, lode or deposit bearing gold and silver 1,500 feet long and 423 feet wide. A copy of the published typewritten survey description was affixed to the bottom of the application. The application for patent of the mining claim was notarized on November 12, 1884. (SOR App., Tab E at 33-34.) It included a "Proof of Posting Notice and Diagram on the Claim" that provided the survey description for the mining claim only, id. at 35-37, a "Proof that Plat and Notice Remained Posted on Claim During Time of Publication," id. at 39, and a "Proof of Publication" submitting a copy of the published notice of Gosper's intent to apply for a patent to both the mining claim and the millsite, id. at 41. Notice of the mining claim patent application was posted in the Register's office in Prescott from November 19, 1884, through June 12, 1885. Id. at 42.

On June 12, 1885, Gosper tendered $80 to the Prescott (Arizona) Land Office as "payment in full for Mineral Entry No. 140, Lot No. 37A, identified as the Golden Eagle Mining Claim, for 15.59 acres, as evidenced by the Receiver's Receipt. (SOR App., Tab E at 44.) The Receiver's Receipt is a typewritten form containing blank lines for information supplied by the mining claimant, such as the claimant's name, the payment amount, the name of the mining claim, Township and Range location, and the like. It also contains a section by which any portion of the claim could be excluded. Thus, after appropriate spaces in which the mining claimant could insert language that described the mining claim by lot number and size, as well as the physical size of the claim, the form includes the typed text "*expressly excepting and excluding* from this sale and Entry all that portion of the ground embraced in mining claim _____or Survey_____designated as Lot_____No._____," followed by several blank lines. This exception language and its blank lines were deleted by handwritten lines drawn through the text. A Register's Final Certificate of Entry for Mineral Entry No. 140 was issued by the Prescott (Arizona) Land Office on that same date. (SOR App., Tab E at 45.)

The millsite claim was entered on the Register of Entries for the Prescott Land Office [9/] as Mineral Entry No. 141. Id. at 47. [10/]

The "papers and documents in the case of Mineral Entry No. 140 of the Golden Eagle Mining Claim" were transmitted to the Commissioner of the GLO by Wing, the Register, on June 12, 1885. Id. at 46. Patent No. 12351 for Mineral Entry No. 140 was signed by President Grover Cleveland and issued to Gosper Horse and Cattle Company on July 22, 1887. That patent described the 15.59 acres in Lot No. 37A. (SOR App., Tab E at 48-52.) The patent did not refer to or describe the 4.99 acres listed in Mineral Entry No. 141 as Lot 37B. Id.

The record before us does not include a similar application for patent for Mineral Entry No. 141, Lot No. 37 B, or any documents like those described above. It seems clear that the documentation supporting Mineral Entry No. 141 no longer exists or cannot be located, to the extent it once did exist. [11/] Nonetheless, it is beyond dispute that the "Register of Entries of Mining Land at the Land Office" contains two entries for the Gosper Horse and Cattle Company: an entry no. 10675 for Lot No. 37A for 15.59 acres, for which Receipt No. 140 was issued, and entry no. 10676 for Lot No. 37B, for 4.99 acres, for which Receipt No. 141 was issued. [12/] A purchase price of $80 was listed for entry 140, while a purchase price of $25 was listed for entry 141, and both were recorded as sold on June 12, 1885. The Remarks section of the Registry contains the following notations for Receipt No. 140:

> Patent No. 12351
> Dated July 22 - 1887
> Rec Vol 148 - p 276

[9/] While the Register of Entries does not legibly identify the local land office at Prescott, the two entries were made seriatim at the same location, which was identified by the Affidavit of Thomas Wing, Register, as the Prescott Land Office. (SOR App., Tab E at 46.)

[10/] Although the Register pages submitted are not independently dated, the entries for the Golden Eagle mining claim and millsite show June 12, 1885, as the date Gosper paid $80 for the mining claim and $25 for the millsite.

[11/] Appellants maintain that the fact that no separate record for the millsite entry could be located indicates that it never existed, which, they argue, establishes that the GLO intended to and did patent both claims as a single entity. As we note infra, we find no merit in the conclusion appellants draw from the absence of a separate record for the millsite, because the documents that do exist relative to Patent No. 12351 and Mineral Entry No. 141 generally refute this conclusion.

[12/] The document was photocopied in such a way that some portion of the page was obscured by a fold in the pages or by the thickness of the Register book itself.

To R & R Aug 19 - 1887
1887
Recpt ackd in letter 96691

Under remarks for entry 141, the Register notes:

> Canceled by Acting Com[mission]er's letter of Aug. 10, 1894. L.M.W. 133H2. B Tiles

(SOR App., Tab E at 47.) The page contains other entries for other patents, and in each case the patent number, its date, the volume and page number of where it was recorded, the date it was referred for recording, and a date of acknowledgment of receipt were noted. There were no such details for Mineral Entry No. 141.

A copy of the August 10, 1894, letter referred to in the "Remarks" column of the Registry of Entries was provided by BLM. It states:

> Sirs: By office letter * * * of May 10/94. M. E. 141 made June 12/85 by the Gosper Horse & Cattle Co. upon the Golden Eagle Millsite, was held for cancellation because of failure to furnish evidence of the use and occupancy of the Millsite and proof of the non-[mineral] character of the land. I am now in receipt of your letter of July 26/94, inclosing [sic] proof of service, and reporting no action taken by the parties in interest. The time for appeal having expired, said M.E. No. 141 is hereby canceled.
>
> Make the proper notes on your records and advise the parties.
>
> Resp.
>
> Edw. A. Bowers
> Actg. Comm.

(Answer, Ex. DD.)

BLM has also provided a copy of two GLO survey note cards. (Answer, Ex. CC at 1.) The first note card documents the issuance of the patent for the Golden Eagle mining claim, noting that the mineral entry was "[a]pproved 11/5/84" for "Survey No. 664," on July 22, 1887. Below that notation, the handwritten inscription "Pat. No. 12351" appears. The second note card pertains to the "Golden Eagle Mill Site, Survey No. 665, [a]pproved 11/5/84." Following the typewritten language are two conflicting handwritten notations: In the space next to the print word "Patented" is

the handwritten inscription "7/87;" immediately below this inscription is a second handwritten inscription which reads, "8-10-94 canceled." Id.

The millsite has been listed as patented property on local property rolls and historic ledgers since 1886. (SOR at 8; SOR App., Tab F.) Appellants have provided tax assessment rolls of Yavapai County showing that, as late as 1905, the millsite was listed as patented land. (SOR App., Tab F at 8.) Appellants state that they purchased the property for the delinquent property taxes due on the land from 1993 through 1995 (SOR at 1; SOR App., Tab B at 3), and provide documentation showing that they continue to pay the property taxes. (SOR App., Tab C at 2.)

The Parties' Arguments

Appellants challenge BLM's decision on the following grounds. [13/] First, they charge that BLM issued a decision that fails to place the historical documentation in the record in its proper legal context. Specifically, they allege that BLM has ignored both historical and current practice, set forth in Revised Statutes (R.S.) 2337, 17 Stat. 96, 30 U.S.C. § 42 (2000), and Departmental regulations found at 43 CFR Subpart 3864, which treats a mining claim and its related noncontiguous millsite as one claim for purposes of issuing a patent. (SOR at 9-16, 18.) Thus, they claim, no separate patent entry was made for the millsite because the established procedure was to include the millsite in the patent for the mining claim. In support of this contention, among other things, they argue that "[t]here is no evidence showing that the millsite was filed and applied for separately[;] no separate application for patent [for the millsite] exists and no separate case file exists." (SOR at 27.) They therefore conclude that Patent No. 12351 necessarily included the millsite claim. (E.g., SOR at 3, 5, 9, 17.) Morever, they argue, the property has been listed and consistently treated as patented since 1885 by local branches of state government. (SOR at 8-9.) For all the foregoing reasons, appellants assert that they are the rightful owners of the property, and that BLM's refusal to recognize their ownership unlawfully interferes with their use and enjoyment of their property. (SOR at 29.)

BLM argues that appellants have failed to demonstrate an error of fact (Answer at 26-29), and that the historical record shows only that Gosper intended to separately apply for patents for the Golden Eagle mining claim and millsite (Answer

[13/] We note also that appellants assert that BLM mishandled their documentation and admitted a lack of knowledge of the requirements of the mining laws, suggesting either questionable motive or misfeasance on BLM's part. While BLM officials obviously disagreed with appellants' theory of their case, appellants have not established that BLM officials acted improperly or in any way prejudiced consideration of the merits of their case.

at 52-53, 59), but failed to meet the requisites for the millsite (Answer at 71). [14/] BLM enumerates various chronological and logical discrepancies in appellants' theory of the case as evidence against the conclusion that the millsite was patented with the mining claim. In addition, however, BLM has submitted the Ravnikar Affidavit, with exhibits, to buttress its conclusion that a substantial portion of the canceled millsite entry apparently was embraced by the Red Sky millsite, which was patented to one John W. Norton in 1903, long after the Golden Eagle millsite entry was canceled in 1894. (Ex. HH to Answer.)

Analysis

On its face, Patent No. 12351 was issued for the 15.59 acres designated in Mineral Survey No. 664 for 37A, known as the Golden Eagle "vein, lode, or ledge" mining claim. This excludes a millsite, which can embrace only non-mineral land. The patent specifically refers to Registry Certificate No. 140 and refers to and recites only the legal description of the lode claim. That legal description matches the land description set forth in the field notes for Mineral Survey No. 664 for Lot No. 37A. A copy of the plat of Survey No. 664 is included in the patent documents, and it clearly does not depict the millsite. The patent notably does not mention the millsite by name or refer to it by survey or lot number, it does not contain or refer to 20.58 acres (15.59 plus 4.99 acres), it does not state or refer to 4.99 acres, and it does not identify, refer to or implicate the millsite in any other way.

[1] Appellants maintain that "[t]he patent does not determine the land to be included in said patent; rather, the law determines land descriptions in patents." (SOR at 22.) Appellants contend that because R.S. 2337, 30 U.S.C. § 46 (2000), allows for issuance of one patent for both claims, the land description in the patent is of no consequence because issuance of the patent for the lode claim operated to convey the associated millsite, without the necessity or formality of identifying and describing it. They further assert that the 1884 survey notes prepared by Foster unequivocally establish that the mining claim and millsite were in fact related (SOR at 15, 28; Response to Answer at 8-16), and note that "[n]o exclusions or exceptions

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[14/] We note that BLM counsel has mischaracterized the applicable standard of review to be applied in appeals of Departmental decisions as whether the decisions are "arbitrary, capricious, or unsupported by substantial evidence, considering the record as a whole." (Answer at 25-26.) As we have admonished countless times, this is not correct. As counsel acknowledges, this is the standard established by the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2000), with respect to judicial review of the Department's final decisions. The Board in fact exercises de novo review authority to determine whether the record in a case supports the action taken by BLM. See, e.g., National Wildlife Federation, 145 IBLA 348, 362 (1998); U.S. Fish & Wildlife Service, 72 IBLA 218, 220-21 (1983).

appear in the plats, the field notes of survey, the Receiver's Receipt, the Final Certificate of Entry or on the Face of the Patent itself, as required by law." (SOR at 25.) This line of argument appears to be premised on appellants' assumption that language in the survey field notes and publication notice describing the Golden Eagle millsite as having been "taken in connection with the Golden Eagle mining claim" thereafter bound the two claims so that they were legally cognizable as a unit, such that patent for the one necessarily embraced patent for the other. Coupled with the "evidence" of the failure to expressly exclude the millsite, they conclude that the mining claim patent conveyed "all the estate of the United States and everything connected with it." (SOR at 20, emphasis in original.) However, as BLM argues, this is simply not correct:

> In general, the quantity of land granted must be ascertained from the description in the patent, as construed in the light of the apparent intent of the government. In order to identify land granted by United States patents, resort must be had to the plat and the field notes of the government survey. Usually, a patent conveys title to all the lands within the established boundaries shown by the official map of the government survey to which the patent has reference, and passes title of the United States not only as it was at the time of the survey but also as it was at the date of the patent. A patent which refers to an official plat of the survey incorporates the plat as well as the surveyor's field notes and descriptions, by reference. [Footnotes omitted.]

73A C.J.S. *Public Lands* § 140 (emphasis added).

Thus, the phrase on which appellants rely merely recognized that Gosper had staked a dependent millsite to be used in connection with mining operations at the Golden Eagle lode mine -- that is, it was an assertion that it met the necessary requirement to be held as a millsite: it was "nonmineral land" that was "not contiguous to the vein or lode" and was to be "used or occupied by the proprietor of such vein or lode for mining or milling purposes." R.S. 2337, 30 U.S.C. § 42 (2000). No automatic conveyance was initiated or triggered as a result of thus describing the millsite's dependent relationship to the mining claim. In any case, appellants' construction is plainly unwarranted, because the survey describes what is to be conveyed, and because the statute states only that such noncontiguous millsites "may be embraced and included in an application for a patent of such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes * * *." 30 U.S.C. § 42 (2000) (emphasis added).

A patent is "the conveyance by which the nation passes its title to portions of the public domain." St. Louis Smelting & Refining Co. v. Kemp, 104 U.S. 636, 640

(1881); Steel v. Smelting Co., 106 U.S. 447, 452 (1882). The patent is both evidence of the lands identified to be conveyed, and declaratory of the title conveyed. Wright v. Roseberry, 121 U.S. 488, 500 (1887). Thus, it is not assumed, as appellants contend, that every piece of land that might be embraced in a patent in fact was conveyed, absent affirmative evidence showing that a parcel was excluded. [15/] Accordingly, the rule is that lands not described or identified in the mineral survey incorporated by reference in the patent instrument are not conveyed out of Federal ownership. Consistent with all the patent documentation, references, and survey plat, we conclude that title to the millsite claim did not pass with issuance of Patent No. 12351, which was issued solely for the Golden Eagle lode claim. We turn now to the question of whether the millsite might have been omitted from the patent in error.

[2] Section 316 of FLPMA grants the Secretary authority to correct errors in patents and conveyance documents where an error requires correction and considerations of equity and justice favor such correction. See Mary D. Hancock, 150 IBLA 347, 351 (1999); George Val Snow (On Judicial Remand), 79 IBLA 261, 262 (1984). In Snow, the Board stated:

> The statute provides that the Secretary may correct patents in order to eliminate error. The first obligation of an applicant for amendment of a land description in a patent, then, is to establish the description is in fact erroneous. Without a clear showing of error, the Secretary is not empowered to exercise [the] statutory discretion to favor or disfavor the application.

79 IBLA at 262. For the reasons that follow, we find that appellants have not established that the Golden Eagle millsite was erroneously excluded from Patent No. 12351.

Appellants argue that Gosper intended to apply for the lode patent and the related millsite as one entity, an assertion that is not borne out by the record. It is true that Gosper expressed its intention to apply for title to both the claim and the millsite, but this is far from proving that it intended to acquire title under a single patent so as to demonstrate a mistake of fact. The record shows that the claim and the millsite were identified and handled separately from the start: the survey was platted separately, separate survey and Lot numbers were assigned, Gosper's

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[15/] For this reason, we reject appellants' assertion that the Golden Eagle millsite necessarily was encompassed by the patent application for the lode claim because the exclusionary portion of the Register's Final Certificate of Entry where the millsite should have been excluded if such was intended, was deleted. (SOR App., Tab E at 45.)

intentions regarding the claim and millsite were separately described in the publication and posting notices, separate Mineral Entry numbers and receipts were issued, separate cash payments were made, [16/] and the Department created separate survey note cards for the claim and millsite.

Nevertheless, appellants argue that the absence of a separate archival record for the millsite patent confirms that the patent for the lode claim included the millsite claim as well. (Response to Answer at 3-6.) They reason that, because the lode claim and related millsite were to be patented "as one claim" under R.S. 2337 (Response to SOR at 28), there would have been no reason for a separate archival file for the millsite (SOR at 31-32). We do not agree.

The preliminary requirements by which the right to apply for a patent is demonstrated are not synonymous with issuance of patent. The preliminary requirements are those specific conditions on which Congress has authorized disposal of the public lands. Generally, when such conditions have been satisfied, the applicant has earned the right to issuance of a patent. In this case, those conditions are set forth in R.S. 2337, which provides, and provided at the time of Gosper's millsite entry, in pertinent part, as follows:

> Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; * * * .

30 U.S.C. § 42 (2000).

In addition to the survey and notice requirements, the General Mining Law requires posting of the plat of survey and notice of the patent application in a conspicuous place on the land, and an affidavit of at least two persons that such notice was published. 30 U.S.C. § 29 (2000). Early Departmental regulations

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[16/] Appellants are correct in the assertion that, generally, "no separate receipt or certificate need be issued for the mill-site, but the whole area of both lode and mill-site will be embraced in one entry, the price being five dollars for each acre and fractional part of acre embraced by such lode or mill-site claim." From "Regulations Under Existing Mining Laws In Effect December 1, 1883" (1883 Regulations) reprinted in Thomas Donaldson, *The Public Domain, With Statistics*, at 986, 1003 (Government Printing Office 3rd ed. 1884). The fact remains, however, that separate receipts for the lode claim and millsite were issued in this case.

required, as do the present regulations at 43 CFR 3864.1-4, that the applicant supply proof that the millsite was non-mineral in character. That requirement, according to the regulations, where unquestioned, could be met by "sworn statement by the claimant, supported by one or more disinterested persons capable from an acquaintance with the land to testify understandingly." 1883 Regulations, *The Public Domain*, at 1003.

Moreover, R.S. 2337 required (and requires) that the millsite be "used or occupied by the proprietor of such vein or lode for mining or milling purposes." 43 U.S.C. § 42 (2000). While the 1883 regulations do not refer specifically to what proof was required to establish use and occupancy, early Departmental case law establishes that millsite patent applications were reviewed in some manner to determine that the use and occupancy requirements in fact had been met. As early as 1886, published Departmental decisions held that land applied for as a millsite must be actually used or occupied for mining and milling purposes; failure to do so subjected the entry to cancellation. See, e.g., Charles Lennig, 5 L.D. 190 (1886); Cyprus Mill Site, 6 L.D, 706 (1886); Two Sisters Lode and Mill Site, 7 L.D. 557 (1888); Iron King Mine & Mill Site, 9 L.D. 201 (1889). In Lennig, Cyprus Mill, and Iron King, the millsites were being used for purposes of obtaining water, which did not constitute use of the land for mining and milling purposes; in Two Sisters, the site was used for logging timber; in Syndicate Lode Mill Site, 11 L.D. 561 (1890), the millsite was occupied by a party to whom the claimant had agreed to sell the land after patent was obtained. [17/]

In Cyprus Mill, Acting Secretary Muldrow held that the Surveyor General's certificate listing improvements for access to a water supply did not demonstrate that those improvements were made for "mining or milling purposes." 6 L.D. at 708. Likewise, while the Deputy Surveyor noted improvements on the Golden Eagle millsite consisting of a stone cabin near a spring and a frame house (SOR App., Tab E at 16), there is no evidence establishing that those improvements were made in connection with mining or milling actually occurring on the Golden Eagle lode claim.

[17/] The Land Office had occasionally permitted a millsite to proceed to patent where the claimant had failed to comply with the requirement to post notice on the millsite. See, e.g., Bailey & Grandview Mining & Smelting Co., 3 L.D. 386 (1885)(failure to post was an oversight, no adverse right had intervened, and extensive improvements had been made). Bailey & Grandview Mining & Smelting Co. was modified by New York Lode and Millsite Claim, 5 L.D. 513 (1887) (mineral entry allowed although notice was not posted on dependent millsite). New York Lode and Millsite Claim was overruled by Peacock Mill Site, 27 L.D. 373, 374 (1898) (only "where the 'error or informality arose from ignorance, accident, or mistake,' and where the law has been substantially complied with," should an entry be referred for approval and confirmation).

The patenting of a millsite with its associated mining claim thus was not a foregone conclusion. To the contrary, the patent application for the millsite could be "held for cancellation," even when the lode claim was patented. See, e.g., Charles Lennig, supra; Cyprus Mill Site, supra. Even when a single patent application was filed for a lode claim and a millsite, the application could be held for cancellation to the extent that the millsite did not meet the requirements of the General Mining Law. Thus, in Syndicate Lode, 11 L.D. 561, both the mining claim and millsite were recorded under "mineral entry No. 437," but it was held for cancellation "to the extent of the mill-site lot No. 2185 B."

If the Land Office held the application for cancellation, the claimant was required to show by affidavit or other means that the millsite in fact was being used for mining and milling purposes pursuant to R.S. 2337. See, e.g., Le Neve Mill Site, 9 L.D. 460 (1889). The time between mineral entry and the final decision cancelling an application could take several years, as it did in this case. See Syndicate Lode Mill Site, 11 L.D. at 561.

The archival record in this matter obviously is not complete. Clearly, the documentation supporting Mineral Entry No. 141 no longer exists or was not located, to the extent it did exist, but those documents that do exist relative to Patent No. 12351 and Mineral Entry No. 141 refute appellants' arguments. Despite the evidentiary gaps, we think the record establishes that, whatever caused the Land Office to initially enter "7/87" in the space next to the word "patent" on the survey note card for the millsite (Answer, Ex. CC), Gosper failed to perfect its application for a patent for the Golden Eagle millsite by furnishing proof that the millsite was being used for mining or millsite purposes and proof of the non-mineral character of the land. Thus, the Acting Commissioner's August 10, 1894, letter to the Prescott Land Office acknowledged receipt of proof of service of the May 10, 1894, letter to Gosper holding the entry for cancellation and Gosper's failure to appeal, and directed the Prescott office to "[m]ake the proper notes on your records and advise the parties.[18/] As no appeal was timely taken, the cancellation became a final decision of the Department. That the letter of cancellation was issued some eight years subsequent to issuance of the lode patent does not per se demonstrate fraud or other irregularity in the proceedings, and we find that the assertion that GLO records were unlawfully altered to defeat the millsite entry (see, e.g., Response to Answer at 24, Appellants' Request to Supplement the Record at 6-10) is not supported by the record as a whole.

[18/] This disposes of appellants' allegation that neither Gosper nor its successor received notice of BLM's intent to cancel the mineral entry. (Response to Answer at 22.) To the contrary, the Bowers letter establishes a prima facie case of notice that remains unrebutted.

A decision of the General Land Office canceling a mineral entry is binding upon the courts when such decision has become final, and is conclusive as to the failure of the applicant to comply with all the requirements for patent. Shank v. Holmes, 137 P. 871, 874, 15 Ariz. 229, 240 (1914), citing St. Louis Smelting & Refining Co. v. Kemp, 104 U.S. at 640; see also 2 American Law of Mining § 51.10[3] (2d ed. 1999). In Shank v. Holmes, 137 P. at 875, the court held that "[t]he cancellation of the entry adjudicates the fact that the entryman obtained no title at all by his entry, and by such act of the land office the entryman is deprived of the ability to claim any right under his receipt." [19/]

Lastly, we dispose of appellants' contention that the millsite entry should be accorded the status of patented land, as it has been treated as such for over 100 years. We first observe that appellants have not submitted copies of records showing the tax status or treatment of the millsite for the last 100 years. [20/] Instead, they provided copies of county records for 1885 through 1890, for 1894, and for 1904. The 1885 record lists only a "possessory right" to the claim and the millsite. (SOR App., Tab F at 1.)

The copy of the "Original Assessment Roll for Fiscal Year 1886" for Yavapai County contains the first suggestion of a possible patent for the millsite, noting for Gosper "20 acres Pat'd Lands & Improvements," but without further describing the acreage. Id. at 2.

The copy of the "Duplicate Assessment Roll" for 1887 erroneously described the claim and millsite as follows:

Govt title to 15.59/acres land Golden Eagle millsite	37A
" " 4.99/acres land Golden Eagle mining site	37B
Coyote Spring Ranch	100 [21/]

[19/] The court in Shank v. Holmes also held that "[t]he mere fact that the amount of money sufficient to purchase the ground remained on deposit after the entry was canceled could give appellee no equitable rights to the ground he wished to purchase * * *." Id.

[20/] Appellants claim that BLM refused the documents they provided "reflecting over a 100 years of continual ownership of lode and millsite." (SOR at 4; Response to Answer at 21.) Whether this is a fair characterization or not, however, appellants did not provide the Board with copies of these documents.

[21/] Appellants argue that Coyote Spring Ranch and the Golden Eagle millsite are one and the same, and that "possessory right to [the] millsite was held by [the] deed" provided as SOR App., Tab G at 5-8. (SOR at 10). The Indenture was between John

(continued...)

Id. at 3.

The copy of the 1888 "Assessment Roll" for Yavapai County for purportedly patented mining claims lists both the mining claim and the millsite. Id. at 4.

No copy of a tax record was provided for 1889, but a copy of a Tax Certificate showing the purchase of the "Golden Eagle Patented Mining Claim and the Golden Eagle Patented Mill Site Claim" by D.T. Mitchell on June 21, 1890, was provided, as well as a list of purportedly patented claims published in the *Arizona Journal-Miner* from 1890 which identifies both the mining claim and the millsite. Id. at 5, 7.

The next document is a copy of a tax record for 1904, and it lists the "Golden Eagle" as a 5-acre claim and the "Golden Eagle Mill-Site" as 15.6 acres, with the unexplained notation "Imp Poss Right in Jeromil" with the number "50" beside it, and the taxpayer is listed as "John W. Norton.". Id. at 6.

The final pieces of evidence are a copy of a 1905 list of patented mines, a portion of which shows that "Norton & Stanley" had acquired the Golden Eagle mining claim and millsite and the patented Red Sky mining claim and Red Sky millsite, [22/] and a copy of a type-written record reflecting that same information. Id. at 8, 9. The evidence thus shows that at some point the belief that both the claim and the millsite had been patented took root, but it also shows that the local tax records may not be relied on as conclusive proof of the matters asserted therein.

[21/] (...continued)
J. Gosper and one John E. Anderson, and it was executed on Oct. 14, 1881, for $1,796. By its terms, it conveyed all Anderson's right and title to "a certain spring and piece of land under fence and known as Coyote Spring and Ranch." It makes no mention of a millsite, nor would it, because the millsite was not located until Sept. 24, 1884. Appellants urge mutually exclusive theories of their chain of title, however, since no patent application would be necessary if Gosper had held title to the millsite ground by virtue of the 1881 private Indenture, and, if accepted at face value, the 1887 tax record shows that the millsite and ranch were different parcels of land.

[22/] As stated, BLM's Chief Cadastral Surveyor at its Arizona State Office offers another clue that argues against appellants' theory. Although not confirmed by an official survey, based on the U.S. Forest Service's recovery of certain U.S. monuments and Forest Service survey ties used to locate the Red Sky millsite, which was located on Nov. 17, 1900, and patented on Dec. 11, 1903, it appears that the patented Red Sky millsite overlays a large portion of the land formerly known as the Golden Eagle millsite. (Answer at 30-33, Ex. HH at 5.)

[3] Fundamentally, however, title to public lands is granted by patent, not by the status reflected in land records. Hudson Investment Company, 17 IBLA 146, 170, 81 I.D. 533, 545 (1974). The grantee of a patent and the successors thereof are on constructive notice of the contents of the patent. Le Marchal v. Tegarden, 175 F. 682 (8th Cir. 1909). Local tax assessment records neither purport to be title nor convit. Agee S. Broughton, Jr., Trustee, 95 IBLA 343, 344 (1987). Appellants' reliance on local tax records to establish their claim of ownership therefore is misplaced.

We find that appellants have not demonstrated, by a preponderance of the evidence, that a mistake of fact occurred in the issuance of Patent No. 12351. Accordingly, BLM correctly denied the application to correct the patent pursuant to section 316 of FLPMA.

Appellants have requested a hearing pursuant to 43 CFR 4.415. Under 43 CFR 4.415, hearings may be initiated on a party's request if there are material issues of fact that cannot be resolved on the basis of the record before the Board. See, e.g., Caughman Lumber, Inc., 157 IBLA 192, 201-02 (2002); Pine Grove Farms, 126 IBLA 269, 274 (1993); Lazy VD Land & Livestock Co., 108 IBLA 224, 228 (1989). That is not the case here, and appellants' request is denied.

To the extent appellants have raised arguments not explicitly addressed herein, they have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed and the request for hearing is denied.

T. Britt Price
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge